

Waterway and Wetland Handbook

CHAPTER 115

ENCLOSURE OF NAVIGABLE WATERS

GUIDANCE PURPOSE AND DISCLAIMER

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PURPOSE

In order to accommodate municipal development it is often necessary for navigable waterways to be altered. Section 30.196, Wis. Stats., was developed so municipalities could totally enclose navigable waters, usually streams, when alternative actions are not sufficient.

MECHANISM

The enclosure of navigable waters by municipalities is regulated by permit.

HISTORY

The first specific legislation authorizing the enclosure of navigable watercourses was Chapter 171, as modified by Chapter 459, Laws of 1963. These law modified s. 59.96(6)(a), Wis. Stats., and created s. 59.96(6)(ab). Metropolitan sewerage commissions of counties containing cities of the first class (Milwaukee) were authorized to enclose watercourses. According to Mr. Ewald Moerke, who was legal counsel for the Milwaukee County Metropolitan Sewerage Commission in 1963, the commission sponsored the legislation because they felt existing statutory authority was insufficient to allow this type of activity.

In the early 1970's a few permits (combination 30.12 and 30.195) were issued authorizing stream enclosures. Then on August 28, 1978, a s. 227.075 hearing request by the city of Green Bay for enclosure of Bairds Creek (Docket 3-II476-400) was denied by Department Secretary Anthony Earl partially on the basis that the department had no authority to issue such a permit except as authorized in s. 59.96(6)(ab).

In order to provide for municipal enclosure of streams, Chapter 19, Laws of 1981, was enacted by the legislature and became effective on July 25, 1991.

STANDARDS

Statutory

"A municipality may enclose waters into an enclosed drain, conduit, storm sewer or similar structure if the department grants the municipality a permit." (emphasis added)

The legislature specifically limited the authority to enclose navigable waters to municipalities, and then only after getting a permit from the department.

"The department may grant this permit to a municipality after following the notice and hearing requirements under s. 31.06, Wis. Stats., if it finds that granting the permit:

1. Is in the public interest;
2. Will not violate public rights; and
3. Will not endanger life, health and property."

The municipality should be required to supply reasons why their proposal meets the statutory standards since the department will undoubtedly be evaluating the standards as they apply to the waterway. The municipality's reasons will likely relate to economics, development, highway construction or municipal services. Keep in mind that these reasons may have just as high a standing or be as important as our application of the standards to the waterway. An attempt should be made to balance our "traditional" evaluation of standards with the municipality's evaluation.

The statute does not address private riparian rights. Presumably, since municipalities have the power of condemnation, any loss of riparian rights would be a private issue between an individual and the municipality.

Administrative Code

1. Wetlands. NR 1.95, Wis. Adm. Code, establishes general standards to be applied by the department decisions affecting wetlands. The department presumes that wetlands are not to be adversely impacted or destroyed. NR 1.95 further specifies the balancing-test to be used by the department when determining the potential adverse effects of a project on a woodland versus the benefit to the applicant.
2. Shoreland areas. NR 115, Wis. Adm. Code, establishes administrative standards to be followed by counties in their administration of shoreland zoning ordinances. These standards should be reflected in the permit.
3. Floodplain areas. NR 115, Wis. Adm. Code, establishes administrative standards to be followed by local units of government in their administration of flood plain zoning ordinances. Permits should require applicants to conform with standards established in NR 116.
4. Environmental Impact. NR 150, Wis. Adm. Code, establishes procedures for determining whether a given project requires an Environmental Impact Statement (EIS). Enclosures are type II actions for which an environmental assessment must be prepared.

5. Navigational Clearance. NR 320, Wis. Adm. Code, establishes clearance, flood flow, plan and information requirements which may be applicable to enclosures.

PROCESS

Application

Municipalities must submit an application for a permit using the joint application form. The locational, plan and floodplain information described in Chapter 85 of the Handbook should be submitted. In addition, the application should indicate ownership of properties adjacent to the enclosure for noticing purposes. The number of floodplain cross sections required is dependent on the length of enclosure. Generally, at least three should be submitted; at either end and in the middle.

Field Investigation

The field investigation should be conducted to determine the accuracy of the information submitted, whether the project will comply with state or local codes and ordinances, and whether the statutory standards will be met. To determine if granting the permit:

1. Is in the public interest

Consider:

- a. scenic beauty
- b. fish and game habitat
- c. water quality
- d. erosion potential and the need for riprap or other protection
- e. need for economic development
- f. need for municipal facilities
- g. need for highway development

2. Will not violate public rights

Consider:

- a. navigation and its various incidents
- b. "Trust Doctrine" preservation philosophy

3. Will not endanger life, health and property

Consider:

- a. adequacy of enclosure design
- b. potential for increased flooding both upstream and downstream
- c. public safety
- d. surface and groundwater drainage

FINAL DISPOSITION

If a permit is granted (no opposition to notice), include requirements needed to ensure conformance with statutory, administrative code or local ordinance provisions. If opposition to the project has been registered by the

department or a member of the public, a public hearing will be required. A Division of Natural Resources Hearings examiner may issue or deny the permit after hearing.

Any person objecting to the decision may seek judicial review by serving and filing a petition in accordance with the provisions of sections 227.15 and 227.16, Wis. Stats., within thirty (30) days of the decision date.

MONITORING

Permits should require the applicant to notify the department five days before starting work and within five days of completion of the work. There should be a follow-up inspection to determine whether the work was done in accordance with the approved plans. Enforcement action should be considered if the work deviates significantly from the plans.

ENFORCEMENT

Section 30.15, Wis. Stats., provides for a forfeiture of up to \$50 a day for any structure in violation of s. 30.12. It also declares an obstruction to be a public nuisance and abatable at the suit of the state or any citizen. Enforcement should be considered if any enclosure was built without proper authority, exceeds the limits of approval or is improperly constructed. Action under this statute may be taken in local court. If warranted, abatement pursuant to s. 23.79(3) should be recommended.

Section 30.33, Wis. Stats., can be used for abatement if an enclosure was build without proper authority and in those instances where local court failed to order it. These actions would be initiated through the Attorney General's Office.

EDUCATIONAL MATERIALS

Pamphlet "Wisconsin's Water Regulation Programs Work for You"

Pamphlet "Public or Private I Navigability"

Pamphlet "Public or Private II The Ordinary High-Water Mark"

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CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: March 13, 1986

FILE REF: 3500 (WMC)

TO: District Directors

PMMS Response

Insertion: Chapter 115, Water Regulation Handbook

FROM: Robert Roden - WZ/6

Distribution: Program Staff

SUBJECT: Program Guidance Regarding Enclosure of Navigable Streams

We have been asked to provide guidance concerning the applicability of Section 30.18, Wis. Stats., as it may or may not apply to the ability of an agricultural user to enclose a navigable waterway.

The particular case involved deals with the application of a farmer to turn a navigable stream into a combination grassed waterway and conduit, the conduit being placed below the surface for the purpose of carrying base flow.

Section 30.196, Wis. Stats., provides that a municipality, under certain conditions, may enclose a portion of a navigable stream. The legislature intended that only municipalities be allowed to enclose streams. This exclusive privilege seems fairly clear under this statute because only municipalities were mentioned.

Section 30.18 deals with the diversion of streams for maintaining the normal flow or level of lakes and streams, or for agricultural benefits. Section 30.18 also allows for construction of canals and conduits for such purposes. However, Section 30.18, Wis. Stats., would not allow for the enclosure of a portion of the base flow of a stream. The rationale for this statement is as follows:

1. Section 30.18, Wis. Stats., is titled "Diversion of Waters from Lakes and Streams." The word diversion implies that the water is taken, channeled, conveyed or moved in some fashion from its existing course and conveyed to another different course. In this particular situation, the applicant's intent is to convey a portion of the water along the same water course in a submerged pipe. This is not a diversion from the stream but rather an enclosure of a portion of the flow of the stream.
2. Section 30.18, Wis. Stats., deals with the temporary diversion of surface waters. The enclosure of a portion of the base flow of a stream is not a temporary change but rather is a change that will persist for perpetuity. A permanent change to the water course would more appropriately be addressed in Section 30.196, or Section 30.195.

We conclude that the only section of the statute that deals with the enclosure of navigable water is Section 30.196. Because Section 30.196 enunciates only municipalities, no other entities are endowed with this riparian right. Section 30.18 is not intended as a mechanism to enclose navigable water but rather to enable a small group of users to temporarily divert surface waters.

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